

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 28, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1758-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2009CF511**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NICHOLAS STONE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Nicholas Stone appeals from a judgment of conviction and an order denying his postconviction motion. He contends that he is entitled to a new trial based upon newly discovered evidence and ineffective assistance of trial counsel. We reject Stone's claims and affirm the judgment and order.

¶2 Stone was convicted following a jury trial of first-degree sexual assault of a child. The charge stemmed from allegations that Stone had, on multiple occasions, licked the vagina of TAO, the granddaughter of his then-girlfriend Cynthia B., when TAO was between the ages of two and five.

¶3 Stone subsequently filed a postconviction motion for a new trial based upon newly discovered evidence and ineffective assistance of trial counsel. In support of the motion, Stone attached an affidavit from his mother, Mary Merker.

¶4 In her affidavit, Merker claimed that she observed an interaction in a conference room outside the courtroom about five to ten minutes before TAO was called to testify. Merker indicated that she saw TAO in the conference room with several people including her mother, Olivia O., and her two grandmothers, Cynthia B. and Rose M. Merker further indicated that she heard Rose M. tell TAO, “You know what to say,” to which TAO allegedly responded, “Yes, I know. My dad told me what to say.” Cynthia B. then allegedly stated, “She has a good memory—better than me,” to which TAO allegedly responded, “Well, just don’t forget my doll! You promised me a doll for my birthday!”

¶5 Merker was a sequestered witness at the trial and was unaware that when TAO testified, she stated that she had not rehearsed her testimony prior to testifying. Merker did not become aware of TAO’s statement until she heard counsel mention it in closing argument. After closing arguments but before the jury returned with a verdict, Merker reported what she had observed occurring between TAO, her mother, and her grandmothers to Stone’s trial counsel, Attorney Jeffrey Murrell.

¶6 In his postconviction motion, Stone argued that (1) Merker's observations involved newly discovered evidence entitling him to a new trial and (2) Murrell provided ineffective assistance when he failed to act on the information by moving for a mistrial.

¶7 Following a hearing on the matter, the circuit court denied Stone's postconviction motion. This appeal follows.

¶8 On appeal, Stone first contends that he is entitled to a new trial based upon newly discovered evidence. Specifically, he cites the affidavit testimony of Merker as new evidence that TAO was improperly coached by her father.

¶9 A defendant seeking a new trial on the basis of newly discovered evidence must establish, by clear and convincing evidence, that (1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking to discover it, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative. *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62. We review the circuit court's decision on whether to grant a new trial based on newly discovered evidence for an erroneous exercise of discretion. *See Plude*, 310 Wis. 2d 28, ¶31.

¶10 The problem with Stone's first argument is that his proffered newly discovered evidence was not new. As noted, the evidence was discovered and relayed to Attorney Murrell before the jury returned with a verdict. Because the evidence was discovered before Stone's conviction, he cannot meet the criteria for newly discovered evidence. Accordingly, the circuit court properly denied his postconviction motion on that basis.

¶11 Stone next contends that he is entitled to a new trial based upon ineffective assistance of trial counsel. Again, he complains that his trial counsel was ineffective for failing to act on Merker's information by moving for a mistrial.

¶12 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. *Id.* at 634.

¶13 Murrell testified at the hearing on Stone's postconviction motion. He acknowledged receiving the information from Merker before the jury's verdict. He then explained why he failed to act on it. Murrell stated in relevant part:

I do remember thinking is this worth a motion for a mistrial, and I just didn't hear enough. I just didn't hear enough allegations that she could be lying, if she was being coached, maybe being rehearsed, it's not unusual to go over trial testimony before presenting a witness with your client or with your witnesses. I do it all the time. I know the district attorneys do it; that's not unusual.

¶14 Detective Shannon Illingworth of the Walworth County Sheriff's Office also testified at the hearing. She had investigated Merker's allegations by talking with TAO's grandmothers and TAO's father, all of whom denied the accuracy of Merker's claims. In addition, she had received a report from the victim-witness coordinator who was assigned to TAO's case and learned that the coordinator was with TAO at all points during the trial. Based on that

investigation, Illingworth did not believe that any crime was committed as to TAO's testimony.

¶15 Ultimately, the circuit court rejected Stone's claim of ineffective assistance of counsel. In doing so, it noted that what Merker reported overhearing could have been family members reminding TAO to tell the truth. It also found incredible the allegation that TAO was improperly coached to lie on the stand. In the court's view, if TAO was improperly coached, that coaching was not likely to occur immediately before her testimony, just outside the courtroom, and in front of the victim-witness coordinator. As a result, it held that Murrell did not perform deficiently by failing to file a motion for a mistrial because it would have been denied.

¶16 Upon review of the record, we are satisfied that the circuit court properly rejected Stone's claim of ineffective assistance of counsel. To begin, Merker's stated observations did not establish a sufficient basis for trial counsel to move for a mistrial. As indicated by the circuit court, what Merker allegedly observed could have been family members reminding TAO to tell the truth. Moreover, the subsequent investigation by Illingworth yielded no evidence of improper coaching. Finally, we note that TAO made her allegations of sexual assault to multiple adults well before trial. This undercuts any suggestion that she was improperly coached immediately before testifying. For these reasons, Stone cannot demonstrate either deficient performance or prejudice

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

